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CENTRAL INTELLIGENCE AGENCY

Office of Legislative Counsel

Washington, D. C. 20505

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11 August 78

TO: Mr. Patrick Norton
Senate Select Committee on Intelligence
Washington, D.C. 20510

Pat:

Per our conversation of this morning, I am attaching a copy of the "views letter" we prepared on H.R. 12171, the "Federal Accounting and Auditing Act of 1978" and a copy of the letter sent by the DCI to Chairman Boland requesting that the House Permanent Select Committee on Intelligence take "sequential referral." HPSCI has requested and has been granted sequential referral of the bill and according to Mike O'Neil will begin considering it after the House reconvenes on 5 September.

If you have any questions please feel free to call.

STAT 
Assistant Legislative Counsel

OLC #78-1736/E



Washington, D.C. 20505

19 JUL 1978

Honorable Jack Brooks, Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I would like to take this opportunity to comment on H.R. 12171, the "Federal Accounting and Auditing Act of 1978."

H.R. 12171 would allow the General Accounting Office unlimited access to all information required to verify confidential funds expenditures, including those currently made by Director of Central Intelligence certification pursuant to authority in subsection 8(b) of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. 403j(b)). If enacted, this would have the operative effect of eliminating confidential funds as a resource available to the Director. Authority to account for expenditure of funds solely on the certificate of an officer of the Government is meaningless if such officer is subsequently required to produce to an external authority complete documentation supporting the expenditure. This authority is particularly crucial where the conduct of sensitive intelligence activities is concerned, and we strongly oppose legislation to override it.

The capability to carry out certain operations in the interests of the United States Government in secret fashion is a capability that has been continued through the nation's history. President Washington, for example, asked for, and was granted, a secret "contingent fund" expenditures authority, for which he could account "by making a certificate of the amount of such expenditure, as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sums therein expressed to have been expended." (Stat. at Large. I. 299) This fund was used by President Washington and successive Presidents in conducting foreign intelligence efforts, and it was well understood that the existence of the fund was grounded on the need for extreme secrecy in certain matters. This rather special capability comes down to us in present times of more complex government in the form of statutory authority for the President's Director of Central Intelligence to exercise control over the expenditures of confidential funds. This is the Director's "8(b) Authority," cited above, the actual terms of which closely parallel the authority given President Washington.

The capability for the Government to fund certain sensitive undertakings in a manner consistent with the requirements for strictest secrecy has never been lost or abandoned throughout our history. H.R. 12171, however, would have such an adverse effect since, if enacted, the bill would supersede section 8(b) of the Central Intelligence Agency Act; no exception is provided for national security interests in general or CIA expenditures in particular. This is unacceptable. It is a basic requirement for the successful conduct of sensitive activities of the Agency that the Director's "8(b) Authority" be preserved. In the future as in the past, it will be necessary to undertake actions of extreme sensitivity for which the withholding of information from all except those directly involved with the activities or in the oversight process is essential to the success of the action.

This bill, in providing for comprehensive, unrestricted and otherwise unlimited access by GAO to Agency activities--through access to Agency "books, documents, papers, records, and other information" and through related external verifications relating to confidential expenditures--to achieve the general and specific purposes of an audit, would not only supersede the Director's "8(b) Authority," but would also directly contravene the Director's statutory authority to protect sensitive intelligence sources and methods from unauthorized disclosure (section 403(d)(3), National Security Act of 1947, as amended; 50 U.S.C. 102(d)(3)). In effect, the bill would make it impossible for the Director to fulfill this responsibility since it would require him to surrender to the Comptroller General without restriction or selectivity all records relating to any particular expenditure. The bill does not reflect the considerations on which the Director's statutory responsibilities and authorities are based; intelligence activities must of necessity be carried out in a confidential manner, and the funding of these inherently sensitive activities is as much a part of that process as are the particulars of the activities themselves. In recognition of these factors, the Congress has provided that funding of sensitive intelligence activities shall not be subject to funding and accounting requirements applicable to other, less sensitive Government activities.

Furthermore, the requirements envisaged by H.R. 12171 are unacceptable in that they would certainly create conflicts which, according to the provisions of the bill, could be taken to open court for resolution. Because the bill would grant the Comptroller General the right to bring an action in the district court to compel the furnishing of any records not supplied to him, the bill has the potential of making the Comptroller General a "special prosecutor" in times of conflict between the Legislative and Executive Branches on intelligence matters. Taking such issues into open court could only further complicate matters, and more importantly, increase the potential for disclosure of intelligence sources and methods, since the Agency, as defendant in such suits, could be forced to discuss in open court activities financed through the use of confidential funds on Director certification.

As a corollary to the problem of the unauthorized disclosure of intelligence sources and methods, it must be underscored that the fact that Congress had passed legislation which would provide for GAO auditing of Agency confidential funds expenditures could have an adverse impact on present and potential intelligence sources. An essential factor in recruiting sources in support of operational activities is the assurance that such relationships will remain completely confidential. Should it become publicized that GAO is reviewing the most sensitive Agency activities, there may well be a tendency for sources of information or support to be unwilling to continue to provide information or support at the risk of their association becoming public knowledge; the degree of concern in this respect could have an even greater impact on future recruitments.

H.R. 12171 is also problematic from the point of view that any "uncleared" GAO employee could have access to the findings of confidential funds audits as well as related materials. The bill is unacceptably silent with regard to the matter of proper security and control arrangements to be provided such information. Even if the major provisions in this bill were acceptable, at a minimum, all GAO personnel to be involved directly or indirectly in such audits would have to be subject to security arrangements identical with those that pertain to Agency personnel (for example, full security clearance(s), and execution of secrecy agreements).

Presently, four active congressional oversight committees (Senate and House Appropriations Committees, Senate Select Committee on Intelligence, and House Permanent Select Committee on Intelligence), with sizeable staff personnel, and the Surveys and Investigation Staff of the House Appropriations Committee, could claim jurisdiction over matters related to audits of CIA confidential funds. In our view, additional independent external audit appraisal authority is not needed, particularly at the cost of a probable substantial additional commitment of CIA manpower to deal with GAO teams and the increased number of individuals and entities having access to sensitive intelligence sources and methods.

It is submitted that treatment of the substance of H.R. 12171 at this time is premature since the same topic is being more appropriately considered in the context of H.R. 11245 (S. 2525), the intelligence charter legislation. Since the confidential funds authority is so fundamental to the successful completion of CIA's mission, consideration of all the issues involved is better left on the agenda of the intelligence charter legislation which, among other things, will address the matter of CIA statutory authorities as a whole.

For these reasons, we oppose enactment of H.R. 12171.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

A rectangular box with a black border, used to redact the signature of Frank Carlucci.

Frank Carlucci